

**J Johnson LLC v City of New York**

2024 NY Slip Op 33479(U)

September 23, 2024

Supreme Court, Kings County

Docket Number: Index No. 515899/2024

Judge: Patria Frias-Colón

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS Part 25  
HON. PATRIA FRIAS-COLÓN, J.S.C.

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J Johnson LLC, 553 Howard LLC and New Day Management  
as managing agent for J Johnson and 553 Howard LLC,

Index # 515899/2024  
Cal. # 26 Mot. Seq. # 1

PETITIONERS,

**DECISION/ORDER**

-against-

The City of New York, New York City Department of Housing  
Preservation and Development and New York City Department  
of Buildings,

Recitation as per CPLR §§ 2219(a)  
and/or 3212(b) of papers considered on  
review of this motion:  
NYSCEF Doc. #s 2-16, by Petitioners  
NYSCEF Doc. #s 23-53 by Respondent

RESPONDENTS.

-----X  
Upon the foregoing cited papers, oral argument July 24, 2024, August 16, 2024 and August 21, 2024, and a hearing on August 21, 2024 regarding Petitioner’s Order to Show Cause (“OSC”), pursuant to CPLR §7805 and CPLR §6301, Petitioners J Johnson LLC, 553 Howard LLC and New Day Management as managing agent for J Johnson and 553 Howard LLC’s Motion for a Temporary Restraining Order is DENIED.

**BACKGROUND:**

On June 10, 2024, Petitioners filed an Article 78 petition<sup>1</sup>. Petitioners sought to challenge Respondents’ directive to cure violations issued by the Housing Preservation and Development (“HPD”). More specifically, Petitioners contend Respondents were arbitrary and capricious in their determination of the way said HPD violations were to be cured<sup>2</sup>. To avoid the HPD from doing cost prohibitive emergency repairs, Petitioners filed the instant Order to Show Cause (“OSC”)<sup>3</sup> seeking to enjoin Respondents from conducting any work, including replacing the roofs on and doing brick pointing to the two subject properties owned and/or managed by Petitioners located in Brooklyn, New York: 553 Howard Avenue and 1149 St. Johns Place. Both subject properties are part of the Alternative Enforcement Program (“AEP”) that is managed by the HPD to monitor the 250 most distressed properties in the City that have been issued a high number of violations<sup>4</sup>. 553 Howard Avenue was entered into the program on January 1, 2023<sup>5</sup>, which at the time had sixty-five (65) open violations<sup>6</sup>. The building located at 1149 St. Johns Place was also entered into the program on January 1, 2023<sup>7</sup>, which at the time had fifty-seven (57) open violations<sup>8</sup>. Once in the AEP, when violations are issued, a property owner is required to correct all open violations within 4 months of

<sup>1</sup> NYSCEF Doc No. 1.

<sup>2</sup> NYSCEF Doc No. 20 at pg. 29.

<sup>3</sup> NYSCEF Doc Nos. 2 and 3.

<sup>4</sup> NYSCEF Doc No. 24 at pg. 2-3.

<sup>5</sup> NYSCEF Doc No. 24 at pg. 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

being notified of the violations<sup>9</sup>. In the instant matter, the AEP issued its findings regarding the conditions of both subject buildings on August 22, 2023, indicating that many of the violations were due to roof defects at both locations and the owner was ordered to immediately replace the roof at each location<sup>10</sup>. On June 12, 2024, pursuant to CPLR §§7805 and 6301, Petitioners were granted a Temporary Restraining Order (“TRO”) preventing Respondents from doing any work to the building<sup>11</sup>. The TRO expired on June 17, 2023<sup>12</sup>. The Court then held a hearing on August 21, 2024 regarding the issues raised by Petitioners’ OSC and Respondents’ opposition.

## POSITION OF THE PARTIES:

Petitioners argue that a TRO is the appropriate remedy because it will prevent Respondents from replacing the roof on the subject properties and give Petitioners an opportunity to repair both roofs, as recommended by their roofing experts, instead of the costly replacement required by the HPD.

Respondents maintain the appropriate vehicle for Petitioners to contest the AEP findings that require both roofs to be *replaced* instead of *repaired* is with an Article 78 petition, which is now time-barred since it was not initiated within 4 months of the issuance of the final orders to correct said violations. To determine whether the petition is time barred and resolve the issues raised in the OSC, a hearing was held on August 21, 2024. Based on the foregoing submitted papers, oral arguments and the evidence submitted during the said hearing, the OSC is denied and the Article 78 Petition is dismissed.

## DISCUSSION:

An Article 78 petition must be initiated within four months of a final determination made by an administrative agency. *See Sherwood Vill. Coop. Section “B,” Inc. v. City of New York*, 173 A.D.2d 461, 462 (2<sup>nd</sup> Dept. 1991); *Renley Dev. Co. v. Town Bd. Of Kirkwood*, 106 A.D.2d 717, 718 (3<sup>rd</sup> Dept. 1984) (“A CPLR article 78 proceeding is the appropriate vehicle for seeking judicial scrutiny of administrative implementation of legislatively imposed duties.”). To determine whether a judicial proceeding is brought in the proper form, the Court need only look to “the reality and essence of the action and not the name which the parties have given it.” *Belsky v. Lowenthal*, 62 A.D.2d 319, 321 (1<sup>st</sup> Dept. 1978), *aff’d*, 47 N.Y.2d 820 (1979). *See also Solnick v. Whalen*, 49 N.Y.2d 224, 229 (1980) (“[I]t is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought”). The statute of limitations’ filing requirement of Article 78 proceedings is strictly construed “[u]nless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner[.]” *CPLR § 217(1)*. *See also Matter of Hepco Plumbing & Heating v New York City Dept. of Bldgs.*, 227 AD3d 903 (2<sup>nd</sup> Dept. 2024). “A determination becomes final and binding when two requirements are met: completeness (finality) of the determination, and the exhaustion of administrative remedies.” *Matter of Boyajian v. Vil. of Ardsley, Zoning Bd. of Appeals*, 210 AD3d 1079 (2<sup>nd</sup> Dept. 2022).

To initiate a proceeding challenging an administrative determination, the statute of limitations

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<sup>9</sup> *Id.* at pg. 3-4.

<sup>10</sup> NYSCEF Doc Nos. 43, 46.

<sup>11</sup> NYSCEF Doc No. 19.

<sup>12</sup> NYSCEF Doc No. 19.

begins to run when an administrative determination that is unambiguous and certain in its effect, is final and binding. *Cauldwest Realty Corp. v. City of New York*, 160 A.D.2d 489, 490 (1st Dept. 1990); *Edmead v. McGuire*, 67 N.Y.2d 714, 716 (1986). An administrative agency's action or determination is deemed to be final and binding when the agency has "reached a definitive position on the issue that inflicts actual, concrete injury" *Save The View Now v. Brooklyn Bridge Park Corp.*, 156 AD3d 928, 928 (2<sup>nd</sup> Dept. 2017). "Generally, the statute of limitations begins to run when the party receives oral or written notice, or when the party knows or should have known, of the adverse determination." *Matter of Singer v. New York State & Local Emps. Ret. Sys.*, 69 A.D.3d 1037, 1038 (3<sup>rd</sup> Dept. 2010); *Biondo v. New York State Bd. of Parole*, 60 N.Y.2d 832, 834 (1983).

On August 22, 2023, HPD issued Orders to Correct numerous violations against both subject properties. Said corrective orders were final and binding on Petitioners, requiring an Article 78 Petition to be filed within four months of August 22, 2023, which would have been December 23, 2023.

Petitioners argue that the four-month statute of limitations period is not applicable here because they are not challenging the HPD determination (replacement of the roofs), rather they are challenging the way HPD is requiring corrective action. More specifically, they are not contesting the need for roof repairs. In fact, Petitioners are "ready willing and able"<sup>13</sup> to start the necessary repair work. Nine months after the August 22, 2023 HPD Order to Correct was issued, Petitioners submitted to HPD a copy of the estimated repair costs (dated May 2024) to repair, not replace roof<sup>14</sup>.

Rather than decide the timeliness of their application, Petitioners urge the Court to issue a TRO pursuant to CPLR § 6301. For a TRO to be issued, a petitioner must show: 1) a likelihood of success on the merits, 2) irreparable harm and 3) a balance of equities in its favor. To support their argument, Petitioners assert "all that must be shown is the likelihood of success; conclusive proof is not required". *Ying Fung Moy v. Hoho Umeki*, 781 N.Y.S.2d 684, 686, 10 A.D.3d 604, 605. (2<sup>nd</sup> Dept. 2004).

Petitioners contend that irreparable harm and balancing the equities are inextricably linked. The danger of losing the property due to the exorbitant costs associated with the roof replacement is irreparably harmful to Petitioners. Therefore, the equities tip in Petitioners' favor since "the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to [Respondents by an] imposition of the injunction." *Poling Transp. Corp. v A & P Tanker Corp.*, 84 AD2d 796, 797 (2<sup>nd</sup> Dept.1981).

Petitioners also assert the City Respondents acted arbitrarily and capriciously because they "neither adhered to [their] own prior precedent nor indicated its reasons for reaching different results on essentially the same facts." *Matter of 2084-2086 BPE Assocs v. State of New York Div. of Housing and Community Renewal* 15 A.D.3d 288, 790 N.Y.S.2d 92 (2005). Petitioners argue that the City did not adhere to precedent because there was no notice prior to the AEP's determination that the roofs needed to be replaced. Petitioners contend the City failed to serve Petitioners with notice to appear before a judge in Supreme Court as mandated by New York City Administrative Code § 26-239(a)<sup>15</sup>, requiring such notice when a building is deemed unsafe or dangerous and detrimental to human life or health. This argument is unavailing because the subject properties were not deemed unsafe, instead, they were deemed to be in need of repair given the numerous building violations issued.

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<sup>13</sup> NYSCEF Doc No. 6 pg. 2.

<sup>14</sup> NYSCEF Doc No. 9.

<sup>15</sup> NYSCEF Doc No. 6 at pg. 7.

In *Matter of Seniors for Safety v NY City Dept. of Transp.*, 101 AD3d 1029, 1029-1030 (2<sup>nd</sup> Dept. 2012), the Appellate Division held it is necessary for “a hearing and a new determination thereafter on the issue of whether the first cause of action is time-barred, and for further proceedings on that cause of action if warranted”. In the instant matter, the Court determined a hearing was necessary to determine the finality of the actions taken by all parties and to decide whether the matter was timely filed. The hearing was held on August 21, 2024.

At the hearing, Property Manager Shulem Burger testified he was hired by Petitioners on April 15, 2024<sup>16</sup> and was aware of the issued Orders to Correct against the subject properties, but he was not sure what structural issues needed to be addressed<sup>17</sup>. Once he was informed that the orders to correct were related to the roofs, he contacted a roofer to determine what type of work needed to be done<sup>18</sup>. He was advised by the roofing contractor that a new layer should be laid on top of the roof to cure the violations<sup>19</sup>. Mr. Burger informed the AEP, but they determined a new layer on the roof was insufficient and that the entire roof needed to be replaced<sup>20</sup>. Mr. Burger testified that completely replacing the roof was cost prohibitive<sup>21</sup> and he contacted additional roofers who told him that adding a new layer was sufficient to address the underlying issues<sup>22</sup>.

Mr. Burger confirmed participating in an inspection with HPD and AEP inspectors on June 18, 2024 for the 1149 St. Johns property<sup>23</sup>. During that inspection, Mr. Burger was instructed what work needed to be done at both buildings<sup>24</sup>. Mr. Burger reiterated that, after the walk through, he would either perform the work the way he wanted or the way HPD wanted<sup>25</sup>. Abraham Hershkowitz, owner of Pinnacle Roofing Company, testified about the results of his inspection of both roofs and disagreed that the roofs needed to be replaced<sup>26</sup>.

Respondents called HPD Inspector Emad Assad from the AEP who testified that he was familiar with both properties and made observations about the condition of the roof at each property<sup>27</sup>. At 553 Howard Avenue he observed leaks coming from the roof<sup>28</sup> and at 1149 Saint Johns he observed multiple cracks in the roof<sup>29</sup>. Mr. Assad Testified that repairs were done at both properties by the owner and HPD in 2009, 2011 and 2021 but the roofs at both buildings kept leaking<sup>30</sup>. At the 1149 Saint Johns property, he specifically detailed observing water coming in from leaks in the roof after multiple fixes<sup>31</sup>. Mr. Assad further testified that simply covering the roof is “not the right way” to keep the problem with leaks from happening and “in a few years the roofs will need to be replaced”<sup>32</sup>. Mr. Assad testified that HPD practice

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<sup>16</sup>Hearing Transcript pg. 10 at ¶¶ 22-23.

<sup>17</sup>Hearing Transcript pg. 11 ¶¶ 7-11.

<sup>18</sup> Hearing Transcript pg. 12 ¶ 1.

<sup>19</sup> Hearing Transcript pg. 14 ¶¶ 4-13.

<sup>20</sup> Hearing Transcript pg. 14 ¶¶ 20-25.

<sup>21</sup> Hearing Transcript pg. 15 ¶¶ 13-16.

<sup>22</sup> Hearing Transcript pg. 15 ¶¶ 17-24.

<sup>23</sup> Hearing Transcript pg. 22 ¶ 8.

<sup>24</sup> *Id.* at ¶¶ 16-22.

<sup>25</sup> Hearing Transcript pg. 23 ¶ 13.

<sup>26</sup> Hearing Transcript pgs. 32-39.

<sup>27</sup> Hearing Transcript pg. 46 ¶¶ 7-10.

<sup>28</sup> Hearing Transcript pg. 47 ¶ 2.

<sup>29</sup> Hearing Transcript pg. 54 ¶¶ 15-16.

<sup>30</sup> Hearing Transcript pg. 57 ¶¶ 21-23.

<sup>31</sup> Hearing Transcript pg. 55 ¶¶ 7-9.

<sup>32</sup> Hearing Transcript pg. 58 ¶¶ 22-25.

is to replace the roof, not to keep covering it<sup>33</sup>.

Finally in an untimely<sup>34</sup> filed reply to Respondents opposition, Petitioners included additional documentation<sup>35</sup>. Given their untimely submission, said documents were not considered by the Court. However, were the Court to have considered Petitioners' untimely reply to Respondents' opposition, their arguments were unavailing. Petitioners reiterated their intent to repair the roof and their challenge of the number of open violations resulting in the subject properties' mandated participation in the AEP. Petitioners asserted the number of open violations was misleading and the statute of limitations should not apply since Petitioners are not contesting the need for roof repair, only the way HPD required correction of the issued violations. The nature and quantity of violations is beyond the scope of review in the instant matter. Furthermore, even if the Court found the statute of limitations did not apply, Petitioners contention that it wants to comply with HPD's Orders to Correct is not supported by the facts. It was not until 2024 when attempts were made to properly address the violations (e.g. the inspection conducted by Pinnacle Roofing and Siding was not done until May 23, 2024)<sup>36</sup>. Petitioners failed to offer any evidence to explain why, to date, the violations regarding the need for brick pointing at both subject properties have not been addressed.

Given the clear statute of limitations violation, the Court is precluded from addressing the substance of the Article 78 Petition. Had it been timely filed, the Court would have been able to consider whether Respondents' decision was arbitrary and capricious. Based on the evidence adduced from the August 21, 2024 hearing, it was clear that a reasonable alternative to resolve the violations in a more safe and cost-effective manner was available as confirmed by the testimony of the roofing expert at the hearing. The City failed to present compelling explanation or evidence to support its determination that roof replacement is the only remedy to resolve the violations. The testimony of their own expert was that replacement was necessary but no evidence was presented to establish why replacement was the only acceptable solution. In fact, such roof replacement would require removal of the roof in both properties, which the parties confirm tested positive for asbestos that would need remediation and could expose the residents of both buildings and the surrounding community to said asbestos elements and other toxins. It is the opinion of this Court that the City should reconsider requiring roof replacement and allow Petitioners to repair the roof as recommended by roofing experts, which could be completed within 2 weeks.

### Conclusion:

The OSC seeking a TRO is denied. The Article 78 petition filed June 10, 2024 is time-barred and dismissed.

This constitutes the Decision and Order of the Court.

Date: September 23, 2024  
Brooklyn, New York



Hon. Patria Frias-Colón, J.S.C.

<sup>33</sup> Hearing Transcript pg. 51 ¶¶ 20-22.

<sup>34</sup> The parties appeared for this matter on July 24, 2024 and a motion schedule was set. As per the Court Petitioners were to reply to Respondents opposition to the OSC by August 12, 2024. Petitioners did not file a reply until August 15, 2024.

<sup>35</sup> NYSCEF Doc Nos. 54-60.

<sup>36</sup> NYSCEF Doc No. 9.